No. 2511.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

JAMES F. FINDLAY, T. CLIVE DAVIES and W. H. BAIRD,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

REPLY BRIEF OF DEFENDANT IN ERROR

Upon Writ of Error to the United States District Court of the Territory of Hawaii.

JOHN W. PRESTON,
United States Attorney for the Northern District of California,
Attorney for Defendant in Error.

Filed this.....day of March, A. D. 1915.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

The Rincon Publishing Company

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PRELIMINARY STATEMENT.

The defendant in error recovered in the court below a judgment against plaintiffs in error in an action of debt upon a bond given through the Collector of Customs at Honolulu, to the United States, relating to the payment of certain penalties incurred

by the master of the British steamship "Orteric", touching certain violations of the Passenger Act of 1882 as amended, the plaintiffs in error being the principal and sureties respectively on said bond. A jury trial was expressly waived, and no special findings were made or requested. The Court gave and caused to be entered a general judgment in the case.

WHAT QUESTIONS MAY BE CONSIDERED.

No request for special findings having been made, the limitations upon the Court as to what may be considered is well settled. We need only refer to the very recent expression of this Court on this very question found in *Dunsmuir* vs. *Scott,* 217 Fed. 200, where the Court uses this language:

> "Under the provisions of Act March 3, 1865, 13 Stat. 501, Rev. St., secs. 649, 700 (U. S. Comp. Ct. 1913, secs. 1587, 1668), the rule is well settled that if a jury trial is waived, and a general finding is made by the court, review in an appellate court is limited to such rulings of the trial court in the progress of the trial as are presented by a bill of exceptions, and that the bill of exceptions cannot be used to bring up the oral testimony for review. *Norris* v. *Jackson,* 9 Wall. 125, 19 L. Ed. 608; *Dirst* v. *Morris,* 14 Wall. 484, 491, 20 L. Ed. 722; *Grayson* v. *Lynch,* 163 U. S. 468, 16 Sup. Ct. 1064, 41 L. Ed. 230; *Streeter* v. *Sanitary District of Chicago,* 133 Fed. 124, 66 C. C. A. 190; *Hill* v. *Walker,* 167 Fed. 241, 256, 92 C. C. A. 633; *W. L. Perkins & Co.* v. *Von Baumbach,* 185 Fed. 265, 107 C. C. A. 371; *New York Life Ins. Co.* v. *Dunlevy,* 214 Fed. 1. In *Dirst* v. *Morris,* Mr. Justice Bradley said:
>
> "'But as the law stands, if a jury is waived

> and the court chooses to find generally for one side or the other, the losing party has no redress on error, except for the wrongful admission or rejection of evidence.'
>
> "The question whether or not, at the close of the trial, there is substantial evidence to sustain a finding in favor of one of the parties to the action is a question of law which arises in the progress of the trial. Where the trial is before a jury that question is reviewable on exception to a ruling upon a request for a peremptory instruction for a verdict. Where the trial is before the court, it is reviewable upon a motion which presents that issue of law to the court for its determination at or before the end of the trial. In the case at bar there was no such motion and no request for a special finding. We are limited, therefore, to a review of the rulings of the court to which exceptions were reserved during the progress of the trial."

FULL STATEMENT.

But assuming that the Court may consider all the questions argued, with confident belief that both law and equity are with the Government in this case, we will proceed to a further consideration of the matters involved, and adopt the complete and accurate statement of facts given in the memorandum opinion of the Court below.

This is an action of debt to recover $7,960 on a bond of the defendant Findlay, master of the British steamship "Orteric", as principal, and the defendants Davies and Baird as sureties, conditioned upon the payment to the United States of America through the Collector of Customs at the port of Honolulu, of such

penalties as, in the language of this instrument, should be "determined by the Department of Commerce and Labor to have been incurred by the said master" by reason of alleged violations of the Passenger Act of 1882 as amended (hereinafter referred to as the Act): 22 Stat. 186; Act of Feb. 14, 1903, sec. 10, 32 Stat. 829; Act. of Feb. 9, 1905, 33 Stat. 711; Act of Dec. 19, 1908, 35 Stat. 583. By stipulation in writing the case was submitted to the Court for determination without the intervention of a jury. From the evidence the facts appear as hereinafter set forth.

On arrival of the British steamship "Orteric" at the port of Honolulu, April 13, 1911, on a voyage from Oporto and Gibraltar, carrying passengers composed mainly of Portuguese and Spanish immigrants destined for Hawaii, an examination of the vessel was made by customs officers assigned to that duty by the Collector pursuant to the provisions of the Act, section 11. This inspection resulted in a report of April 17, disclosing violations of the following sections of the Act: 2, relating to berths; 3, light and ventilation; 4, food; 5, hospitals; 6, discipline and cleanliness; 7, posting of notices prohibiting ship's company from visiting steerage quarters. Immediately the Collector gave written notice to the master of his liability to penalties in respect to the ship "Orteric" for these violations, specifying them in detail, and also for violations of section 9 relating to passenger manifests. Moreover, this notice stated the maximum penalty in each instance, offering an opportunity "to present any statements desired", and di-

rected attention to section 13 of the Act providing a lien upon the offending ship for these penalties. Thereafter the local agents of the "Orteric" directed to the Collector a letter dated April 22, requesting him to cable to the Secretary of Commerce and Labor (hereinafter called the Secretary) for permission to grant clearance to the "Orteric" "upon a satisfactory bond being furnished for the payment of any penalties which may be imposed in respect to the alleged violations of the Passenger Act by that steamer, * * * full particulars regarding the matter to be furnished to the Department of Commerce and Labor for their determination of what shall be done in connection therewith." On the same day the agents had already directed another letter to the Collector, making "application for clearance of the said steamer for Victoria, British Columbia," and "in view of the alleged violations" offering to "furnish an adequate bond covering the same, providing that the facts concerning such alleged violations be submitted to the Secretary * * * for determination". The Collector, by cable, notified the Secretary of the application for clearance "under bond covering alleged penalties" and recommended "favorable consideration", to which the acting Secretary replied by cable of April 22, "With approval United States Attorney clear 'Orteric', fifteen thousand dollar bond." The bond in suit, for this amount, was thereupon executed and by the United States Attorney was "approved as to form and sureties". The bond recites, by way of introduction, the Collector's notice to the master of

the latter's having "incurred certain penalties on account of alleged violations" of the Act, and the department's authority to the Collector to grant immediate clearance upon the furnishing of an approved bond "to insure the payment of such penalties for such violations aforesaid as shall be determined by the department * * * to have been incurred by the said master after the presentation within a reasonable time, by the said master, or his agents or attorneys, and the officials of the United States at Honolulu, of the facts, to said department." The condition of the bond is the payment by the master to the United States through the Collector, of "the amount which the Department of Commerce and Labor of the United States shall, upon such presentation of facts, determine that the said principal is liable for on account of such penalties so alleged to have been incurred". Upon delivery of the bond to the Collector, on April 23, clearance was granted forthwith.

Thereafter the Honolulu attorneys for the master sent to the Collector a letter dated April 27, in which "in order to preserve the rights" of their client, they "formally enter protest against the imposition of the penalties aforesaid and all penalties whatsoever that may be imposed on account of alleged violations" of the Act, but promise to file with the Collector as soon as possible "a full statement of the facts concerning the said alleged violations, to be submitted to the Department of Commerce and Labor in order that it may arrive at a proper determination of the matter".

After some extension of time granted to the master for his submission of facts, the Collector, on June 14, received from the Honolulu attorneys a letter "submitting for presentation to the Department of Commerce and Labor" the affidavits of the master, the chief officer, the ship's doctor, and one of the nurses of the "Orteric," and "copies of notices in the English, Portuguese and Spanish languages, which were posted according to the above mentioned affidavits as required by said section 7" of the Act, and which the master's attorneys state were "obtained" by them "on board the S. S. 'Orteric' from the captain and chief officer thereof". Also, this letter promised an endeavor to have the owners furnish the department with a copy of the ship's plans and specifications referred to in the master's affidavit, and asked permission to submit a supplementary presentation of facts concerning the alleged violations of section 3, as to ventilating apparatus, by affidavit or affidavits to be secured immediately upon the return of a Mr. Campbell who was to arrive in Honolulu on June 16, and who was expected to establish inspection and approval of the ventilating apparatus at the port of clearance by emigration officers. There is no evidence before the Court, however, that any submission of the plans and specifications, or any supplementary presentation of facts as to ventilating apparatus, was ever made. A summarization of the affidavits follows:

Section 2, Berths: The master admits the violation of section 2 of the Act in that all single male

passengers were, after March 5, not berthed in the fore part of the vessel in a compartment separate from the space or spaces appropriated to other passengers, but on account of a riot between the Spanish and Portuguese male passengers it was, "in order to maintain discipline and prevent bloodshed, * * * deemed mandatory to segregate the Portuguese passengers from the Spanish passengers, and therefore the affiant removed said Portuguese male single passengers from said compartment in the fore part of the said vessel aft".

Section 3, Light and Ventilation: The master does not attempt to show the ship's provisions for light and ventilation to have conformed with the requirements of the Act but deposes to his "belief that the ventilating devices in each compartment occupied by passengers * * * were equal in capacity and utility to the ventilating specifications set forth in section 3 of the Act, * * * as will be more particularly shown by a copy of the plans now in possession of * * * the owners of said steamship, and the specifications attached thereto, to be supplied for use in connection with this affidavit", (but, as above noted, not supplied). On the contrary, the master attempts to bring the case within the concession made by this section of the Act, that "in any steamship the ventilating apparatus provided, or any method of ventilation adopted thereon, which has been approved by the emigration officers at the port or place from which said vessel was cleared, shall be deemed a compliance with the foregoing provisions". In this

behalf, he deposes "that on the 21st day of February, 1911, the said steamship was cleared from the port of Oporto in Portugal, * * *; that on the day preceding about 10 Portuguese officials, among whom affiant believes were included Portuguese emigrant officials, carefully inspected the said steamship, * * * with reference to construction, equipment, food supply, and ventilation, and (the said steamship) was approved in all such respects and otherwise by all of said officials". As to water-closets in number in proportion to the number of passengers according to the requirements of said section 3, * * * all enclosed, some of which were located on one side of the upper deck * * * and the others on the other side of said upper deck." Nothing is said as to the closets being "properly enclosed and located" or "kept and maintained in a serviceable and cleanly condition throughout the voyage", within the provisions of the Act, though these were subjects of complaint by the Collector, and though the point to which the affidavit is especially directed, sufficiency in number of closets, is not made by the Collector at all but is conceded by his letter of April 17, and therefore called for no reply or statement in behalf of the ship. Moreover, the benefit of official inspection is not extended by the above exception to the matter of closets.

The affidavit's introductory statement should here be noted, "that on the 24th day of February, 1911, the said steamship left Gibraltar with about 1,500 Spanish and Portuguese emigrant passengers aboard

whose destination was Honolulu; that about 550 of said passengers were Portuguese and the remainder Spanish; and it should be noted that nothing was said as to whether some of these passengers were taken on at Gibraltar—in which case a new and favorable inspection would be required, to bring the case within the benefit of the above exception. The above-mentioned report of the inspectors was in the hands of the Secretary for consideration in this case; it shows that 1,000 of the passengers were taken on at Gibraltar, after there had been taken on at Oporto, three days before, but 300 passengers, and at Lisbon, two days before, only 252 more. So the master, while claiming exemption, has failed to show that he is within the proviso of section 3—indeed, has apparently attempted to mislead the Secretary by such a suppression and perversion of facts as would imply an inspection after all, instead of about a third of the passengers, had been taken aboard.

Section 4, Food: The master here also deposes by way of concession and justification, or confession and avoidance, "that while milk for infants and children was served regularly only twice a day, nevertheless mothers of such infants and children were at all times supplied upon application with condensed milk at other times, and often served at irregular times without application".

Section 5, Hospitals: The master deposes that the hospital compartments were "ventilated by large skylights and portholes", but does not meet the complaint that the ventilation was insufficient. He also

deposes to the utilization as hospitals of two large compartments aggregating more than 1,500 square feet, but gives details showing that the access of air was not direct and was cut off in rough weather. On this point the affidavit appears to dodge the question of the suitability of the regular hospital and to attempt to divert attention therefrom to two special, makeshift hospitals.

Section 6, Discipline and Cleanliness: The master makes no denial of the alleged filthy condition of the ship, but deposes that he, the chief officer, the ship's doctor, and an interpreter, almost every day, and one or more of them every day, inspected the ship and passengers and "warned and directed the passengers to keep themselves in a cleanly condition and to stay on the upper deck as much as possible", and "directed said passengers to air their baggage and bedding whenever the weather would permit, but with few exceptions the said passengers refused to do so, stating that they feared their belongings would be stolen", and he deposes that on account of the great number of passengers, the crew could not air the bedding and baggage without the passengers' assistance, and that at all times the crew "was engaged in cleaning the decks and compartments, and did all in that respect that could reasonably be done". The master thus, in effect, regards the statutory duty of the ship as performed by its officers' merely directing the passengers to maintain cleanliness. The ship's condition of disorder and filth on arrival at Honolulu is attributed to excitement of the passengers in view of

the approach of landing and end of the voyage—who threw the remnants of their breakfast about the floors and decks, instead of overboard as they had customarily done theretofore, and also to the tearing of cloth from mattresses in order to make bags for their belongings, with consequent scattering of the mattress-stuffing. And it is stated, that it was at the Collector's direction that the ship was left in this condition for several days after docking, a precaution, by the way, which enabled the inspectors and the grand jury, who also visited the ship, to see conditions *in statu quo*.

The master then deposes to the posting of copies of section 6 of the Act in the Portuguese and Spanish languages, in all of the companionways, and in various parts of the vessel; but states that in the course of the voyage many of them were torn down by passengers, and that such notices were again posted about two weeks before reaching Honolulu; also that very few of the passengers could read—as if the Act made this posting at all dependent upon the literacy of the passengers.

Section 9, Passengers' Manifest: The master admits that "the shifting of the passengers in order to segregate the Spanish from the Portuguese, resulted in some confusion, making it impossible for affiant to include in the list of passengers the exact compartments and spaces occupied by them thereafter".

The affidavit of the chief officer "confirms * * * in all respects" the affidavit of the master, as does the affidavit of the ship's doctor. The doctor also de-

poses that all compartments and decks were swept not less than twice daily, and were treated daily with a suitable disinfectant; that he would not permit the washing of apartments occupied by passengers because in his opinion and from the experience of physicians in change of emigrant vessels, such washing results in unavoidable dampness highly detrimental to health. He deposes that "any and all accumulations * * * were rendered physically harmless and innocuous by disinfectants", and "the sleeping apartments were scraped with shovels every day and swept", and "most of the litter found on board * * * at Honolulu was the result of food and rubbish and the contents of mattresses being thrown or strewn about the deck by the passengers in their excitement and haste to land". He says that "the temporary or additional hospital quarters * * * were, in the opinion of the affiant, well suited to that purpose considering the circumstances", but though deposing that he "directly superintended all of the sanitation and sanitary measures", he says nothing about the regular hospital and its ventilation. "The mortality on board said vessel", he attributes "very largely to the concealment by parents of the ailments of their children and their refusal to submit them to medical treatment". "While," as he says, "milk was served regularly only twice a day, nevertheless condensed milk was served at irregular times each day to the mothers for the use of such children, both upon application and without application"; "constant inspection was made by affiant, and milk supplied in

all cases where it was found necessary", and "a quantity" (stating it) of condensed milk was provided "ample for the requirements of the children and nursing mothers". The water supply for bathing and washing of said passengers was unlimited, and the usual accommodations for washing existed.

One of the nurses deposes that "she assisted throughout said voyage in caring for the passengers who were ill and for infants; that milk was served twice daily regularly * * * and at irregular times in addition whenever desired by the mothers of infant children and also whenever it appeared necessary to the hospital staff; that affiant believes that milk in ample quantities was served at all times". Her statements as to hospitals and ventilation is the same in substance as that of the master, whom she also confirms as to the riot and the consequent segregation of Portuguese and Spanish.

The Collector thereupon, on June 17, forwarded to the Secretary, the master's showing of affidavits and copies of posted notices, and the Collector's own showing which consisted of the bond in suit, the above-described letters and cablegrams (by original or copy), also the inspector's report of the vessel's condition, and a letter of the Collector to the United States Attorney at Honolulu dated April 17, transmitting this report and calling attention to the violations of the Act, a letter (copy) of April 18 of the Portuguese Consul at Honolulu to the Governor of Hawaii protesting against the sanitary conditions of the vessel, the report (copy) of the grand jury for

the April, 1911, term of this Court adverse to the master on the same points as covered by the above-described letter of the Collector to the master. And a few merely formal and immaterial letters of acknowledgment and of transmission between the Collector and other officials were included among the papers presented to the Secretary. He also had before him a letter directed to the department by the Washington attorney for the owners, dated April 22, but not received until two days later, and perhaps of no bearing on the question of the object of a bond the negotiations for which had already been consummated by other, and the leading attorneys in the matter at Honolulu, but which in fairness to the respondents should nevertheless be mentioned as possibly not so equivocal as the bond and the preceding Honolulu correspondence, and as more clearly capable of being read as contemplating some kind of an "adjudication", *i. e.,* arbitration, by the Secretary. Though, under all the circumstances, the conclusion is inevitable that, even if this letter did imply an arbitration, it would not express the actual object of the negotiations. This conclusion is borne out by several considerations. In the first place, the Washington attorney had no part either in the preparation of the bond, or of the submission pursuant thereto, *i. e.,* of the matter which the bond was intended to cover and which would indicate the bond's purpose; and it may be fairly found from the evidence, direct and circumstantial, that any light of his statements would be at most no more than dimly reflected light. Even

giving his use of the word "adjudication" a strict sense, certainly not called for by any controlling fact or presumption of fact or of law (but quite the contrary), he, still, was not in as good position to characterize the proceedings as were those others who were active in the actual negotiations and on the field, and whose request for clearance discloses that the object of the proposed submission of "full particulars regarding the matter", was the Secretary's "determination of *what shall be done in connection therewith*" (agent's letter of April 22, above). Furthermore, while it might be a possible, though it is by no means a necessary, nor even the probable or reasonable inference from the Washington attorney's letter of April 22, that it was he who had the first advice and direction from the owners of the vessel and so himself initiated the proceedings; still it is important to repeat that the Honolulu attorneys were the ones on the ground and that it was really their application for clearance, or that of the local agents under their guidance, which was acted upon, and not the application of the Washington attorney, whose letter, as suggested above, did not reach the department until two days after the vessel had cleared —sent on a Saturday and not received until the following Monday (as shown by the department's receipt stamp on the face of the letter). Also, after the submission to the Secretary this attorney, though specially requesting by letter of July 11, further time for presentation of a "Written brief of his contentions" to be "supplemented * * * by a verbal

presentation" of "the points which he desires the Department to consider", nevertheless failed to present any defense of the master or any argument in support of a defense—indeed, did not appear at all, as he would naturally have done if the consideration of the Secretary had been *quasi*-judicial instead of executive, *i. e.,* in the nature of judgment on disputed facts rather than of pardon for admitted acts.

This letter of April 22 recites the vessel's detention for alleged breaches of the Act, the details of which are unknown, and in view of the time required for this attorney and the Secretary to fully ascertain the facts and of the urgent importance of minimizing delay (as a cargo waited at Seattle), requests the department to instruct the Collector by cable to report by cable "the cause of the detention with such details as may be necessary to enable the department to act on the owner's request, which is that permission be granted to the vessel to proceed on her voyage "upon her master or Honolulu agent entering into bond for the making good of any penalty found to be due either by the vessel or the master, and that upon the coming in of a formal report of the matter the questions involved be then adjudicated upon after hearing".

The Collector, in his letter of June 17 transmitting the papers in the case, reported penalties aggregating $7,960 as follows: "Section 2, $5 for each statute passenger—1,242 at $5—$6,210; section 3, penalty of $250; section 4, misdemeanor reported to United States Attorney; section 5, penalty of $250; section 6, penalty of $250; section 7, misdemeanor reported to United

States Attorney; section 9, penalty of $1,000." And it will be observed that in the consideration of the case, no action was taken as to the violations of a criminal nature, alleged in the Collector's letter notifying the master of his liability, namely, breaches of sections 4 and 7 of the Act, which are misdemeanors.

On December 4, 1911, the acting Secretary directed to the Collector a letter in this matter, which he characterizes as "the application of James Findlay, master, for relief from the penalties incurred in the case of the steamer 'Orteric' for violations of the Passenger Act", namely, sections 2, 3, 5, 6 and 9, but not sections 4 and 7 involving misdemeanors. After reviewing at length the report of the grand jury, the acting Secretary concludes:

> "From the papers submitted, it is evident that this vessel with 1,242 statute passengers was navigated on a voyage of eight weeks under all conditions of weather in violation of practically all of the provisions of the Passenger Act having to do with the health, comfort and well being of the passengers. The death of 57 children during the voyage marks this as the worst case ever submitted to the Department. The sexes were not properly segregated during a large portion of the voyage, the master stating that the confusion was such that it was impossible for him to state in the manifest the exact compartments and spaces occupied by the various passengers. The ventilation of the ship appears to have been wholly inadequate, this lack of ventilation in the opinion of the grand jury, increasing the rate of mortalits. Ill-ventilated hospital facilities without adequate equipment were furnished; the manifest of the vessel was not completed, and the sanitary conditions of the vessel were inexcusable. The

Department concurs in the following extract from the report of the Grand Jury:

"'We cannot emphasize too strongly the necessity for the abservance of the regulations requiring vessels to be kept in a clean and sanitary condition. When poor immigrants, perhaps unaccustomed to modern methods of sanitation, are brought into a tropical climate such as Hawaii, not only their own good, but the good of the community in general is subserved by a rigid insistence on compliance with the law.'

"In the opinion of the Department, penalties aggregating $7,960 were incurred in this case for violation of the sections enumerated and it declines to intervene in behalf of the offenders."

Due notice of this determination was given to the principal and sureties and demand made for payment of $7,960 covering the above penalties, but such payment the obligors have refused and neglected to make.

AUTHORITIES AND ARGUMENT.

It would seem that a correct interpretation of section 5294 of the Revised Statutes of the United States defining powers of the Secretary of the Treasury to remit or mitigate fines, penalties and forfeitures, is vital to a correct consideration of merits of the cause submitted by the record herein. This section reads as follows:

"Sec. 5294. (Remission or mitigation of fines, penalties, and forfeitures under laws relating to vessels—informers' rights.) The Secretary of the Treasury may, upon application therefor, remit or mitigate any fine, penalty or forfeiture provided for in laws relating to vessels or dis-

> continue any prosecution to recover penalties or relating to forfeitures denounced in such laws, excepting the penalty of imprisonment or of removal from office, upon such terms as he, in his discretion, shall think proper; and all rights granted to informers by such laws shall be held subject to the Secretary's powers of remission, except in cases where the claims of any informer to the share of any penalty shall have been determined by a court of competent jurisdiction prior to the application for the remission of the penalty or forfeiture; and the Secretary shall have authority to ascertain the facts upon all such applications in such manner and under such regulations as he may deem proper."

It of course will not be controverted that whatever powers are granted in said section were, by section 10 of the Act of February 14th, 1903 (32 Stat., p. 829), transferred to the Secretary of Commerce and Labor.

The power granted therefore is upon "application therefor" to "remit or mitigate any fine, penalty or forfeiture provided for in laws relating to vessels" or to "discontinue any prosecution to recover penalties excepting the penalty of imprisonment, * * * upon such terms as he in his discretion shall think proper".

Certainly the words "in laws relating to vessels" is broad enough to cover the Passenger Act of 1882 as amended. Certainly it is not necessary to wait for a suit, criminal or civil, to be instituted, for the Secretary is given discretionary power as to any fine, penalty or forfeiture "provided for". The words "provided for" are certainly no stronger than the word "incurred" would have been. The fact that the fur-

ther specific power in regard to pending suits is concerned, makes the conclusion certain that the power may be exercised before suit is instituted.

In fact in the case of *Pollock* vs. *Bridgeport Steamboat Co.,* known also as the Laura, 114 U. S. 411, 29 L. Ed. 146, the constitutionality of this section is expressly upheld as well as the power of the Secretary defined, and in this case a remission by the Secretary prior to the trial of an *in rem* suit by informer, was held to effectually destroy the liability of the vessel.

The syllabus was by Mr. Justice Harlan and is as follows:

> "A remission by the Secretary of the Treasury under section 5294 of the Revised Statutes, of penalties incurred by a steam vessel for taking on board an unlawful number of passengers, where the remission is applied for before a suit *in rem* brought for the penalties against the vessel, by an informer, is tried, is effectual to destroy all liability in the suit."

In line with the principle here announced are the following cases holding that this power may be exercised before, as well as after, judgment in a case:

> *U. S.* vs. *Morris,* 10 Wheat, 246, 295-6;
> *Peacock* vs. *U. S.,* 125 Fed. 583, 588;
> 17 Ops. Atty. Gen., 282, 3, 4.

See, also, 24 Ops. Atty. Gen. 583, 588.

It may be contended (as it was in the court below), that this section 5294 does not apply to vessels of other countries. In this connection we can do no better than quote the apt and well considered language of the opinion of the court below as follows:

"But on this aspect of the case, counsel for the defendants argue that the power of the Secretary to remit is wanting, quite as much as the power of the collector or the Secretary to submit to arbitration; and the earnest contention is that the provision of the Revised Statutes, sec. 5294, as amended, upon which is founded the Secretary's power to remit, does not apply to any other subject than those within the purview of the power of remission given by the original act of Congress, 16 Stat. 458, embodied in this section of the Revised Statutes, to wit, 'any fine or penalty provided for in this act', etc. Now, this original act, of February 28, 1871 (of which section 5294 of the Revised Statutes represents section 64), entitled 'An act to provide for the better security of life on board of vessels propelled in whole or in part by steam, and for other purposes, "excepted from its provisions" vessels of other countries', Revised Statutes, sec. 4400, Act of 1871, sec. 41, 16 Stat. 440. And so, if we must be guided not by what the present statute, Revised Statutes, sec. 5294, says on its face, but by what the original statute says, then it is conceded that the power to remit does not apply to the 'Orteric', which is 'a vessel of another country'. But the argument overlooks the provisions of sections 5595 and 5596 of the Revised Statutes, which declares that these Revised Statutes 'embrace the statutes * * * in force on the 1st day of December, 1873, *as revised',* and that 'all acts of Congress passed prior' to said date, 'any portion of which is embraced in any section of said revision are hereby repealed, and the section applicable thereto shall be in force in lieu thereof'. See *United States* v. *Tucker,* 122 Fed. 518, 523. Accordingly, in *United States* v. *Bowen,* 100 U. S. 508, 513, the Federal Supreme Court held 'that the Revised Statutes must be treated as a legislative declaration of what the statute was on the 1st of December, 1873, and

that when the meaning was plain the courts could not look to the original statutes to see if Congress had erred in the revision'—which 'could only be done when it was necessary to construe doubtful language'. *Viethor* v. *Arthur,* 104 U. S. 498, 499; *Arthur* v. *Dodge,* 101 *Id.* 34, 36; *Deffeback* v. *Hawke,* 115 *Id.* 392, 402, in which Mr. Justice Field holds that 'no reference can be had to the original statutes to control the construction of any section of the Revised Statutes (even), although in the original statutes it may have had a larger or more limited application'. *Cambria Iron Co.* v. *Ashburn,* 118 Id. 54, 57; *Hamilton* v. *Rathbone,* 175 Id. 415, 419, 420; *The Brothers,* 10 Ben. 400; 4 Fed. Cas. 318, No. 1,968; *United States* v. *Sixty-five Vases,* 18 Fed. 508, 510. The suggestion of Judge Blatchford to the contrary in *The L. W. Eaton,* 9 Ben. 289, 15 Fed. Cas. 1119, 1123, col. 2, No. 8,612, has thus been overruled. See, also, 1 Lewis' Sutherland on Statutory Construction, 2d ed., sec. 271, 2 Id., sec. 450."

From the above we think it logically and necessarily follows that upon application therefor, whether suit has, or has not been started to enforce penalty, the same may be remitted by the Secretary of Commerce and Labor.

ESTOPPEL.

Plaintiffs in error should be estopped to urge that suit must first be instituted.

If we are right in assuming that 5294 of the Revised Statutes covers a case where civil penalties under the Passenger Act of 1882, as amended may be remitted, it seems clear that plaintiffs in error should

not be heard to say that suit must first be brought and the boat libeled before the power of the Secretary arises.

The first step necessary to enforce the penalties against the vessel would have been to seize her and then file the libel.

The Fidelity, 8 Fed. Cas. 4755.
The Frank Sebira, 45 Fed. 641.
The May, 16 Fed. Cas. 9330.

The facts are that the Collector notified the vessel of the claim for the penalties and but for the voluntary application of the agents of the vessel, she would have been seized and a libel filed to enforce the penalties.

(Trans., pp. 105 to 108.)

The bond in suit was given to prevent this very thing. The boat was thus allowed by the voluntary act of the agents of the vessel to depart the jurisdiction of the Court and thus to render enforcement of penalties improbable if not impossible. The government thus suffered detriment, prejudice and injury which is sufficient basis for holding that a case of estoppel *in pais* in favor of the defendant in error has been made out.

See Vol. 5, Encyc. U. S. Rep., pp. 937 to 50, where the authorities are collated.

Here then we have a party applying for relief upon a matter in the jurisdiction of the other party to grant. We also have the said other party altering his status and thus suffering injury by reason of the vol-

untary acts of the said party, and unless some other matter appear in this case that will defeat recovery, why should not the plaintiffs in error be held to the position so voluntarily assumed by them? Why should they be allowed to play fast and loose with the government? Why should they be allowed to "eat their cake" and "keep it also"?

Having taken all the benefits of clearing their vessel without libel proceedings against it, they should now be made to stand the burdens of the obligation given by them. The transaction, if the contention of plaintiffs be upheld, would lack at least some of the elements of good faith, a position that should not be upheld if any law exists to prevent it.

VALIDITY OF THE BOND.

It follows if the foregoing premises are correct, to-wit, that Revised Statute 5294 applies to a case of this character, and that plaintiffs in error applied for a mitigation or remission of penalties, that a necessary implied power existed to take a bond to indemnify against loss that would follow a failure to seize and libel the vessel. The Court below pointed out authorities sustaining the right to exact or accept a bond in cases similar in principle to this. This view finds support in the following cases, among many:

United States v. *Garlinghouse,* 25 Fed. Cas. 1258, 1260, No. 15,189;
Neilson v. *Lagow,* 12 How. 97, 107, 108;
United States v. *Hodson,* 10 Wall. 395, 405-408, 409;

United States v. *Mora,* 97 U. S. 413, 419-421, 422;
Rogers v. *United States,* 32 Fed. 890;
Great Falls Mfg. Co. v. *United States,* 18 Ct. Cl. 160, 195.

The validity of such bonds I take to be practically admitted by counsel in their brief, pages 22 to 28, by the use of such language as this:

> "We do not deny the capacity of the United States to enter into contracts and take bonds, etc., through the instrumentality of the proper department; we do not deny the capacity of the principal, but the authority of the agent. It is elementary that an agent can act for the principal only within the scope of his employment."

The authority of the agent, to-wit, the Secretary of Labor, has already, we think, been conclusively shown. Again, on pages 28 and 29 of his brief, counsel uses this language:

> "It might possibly be conceived that the power to exact a bond whereby the accused agreed to pay such penalties as may have been incurred could be considered as an incident of the power to remit, but the determination of the penalty, as already pointed out, is a judicial question and one that the courts alone can determine under the provisions of this Act. No authority to make such a determination is expressly given to the Secretary and none can be implied."

If we assume that the penalties had already been "incurred" then out of counsel's own mouth a valid bond could or might be exacted, counsel thus resting almost his entire case upon the point that nothing

short of a suit in court could fix a liability upon the vessel. This latter proposition we think is not sound, and if it were sound, plaintiffs in error, we think, should be estopped as above set forth, to deny it. Again we quote from the opinion of the Court below:

> "Finally, counsel for the defendants would at all events save their case by the contention that 'even if the Secretary could remit a fine, that would not give him or the Collector of Customs the power to impose a fine'. They say, 'no penalty can be imposed upon the master until there has been a judicial determination of his liability', and in spite of the bond, the parties are left just where they started. But, we need not take the time to determine whether the Collector or the Secretary has the power to 'impose' a penalty. See 17 Ops. Atty. Gen., 282, 283, 284; 24 Id. 583, 588. Here, we have an admission by the master of the alleged violations of statute: See summary of his affidavit submitted, and discussion thereof, *supra;* and where a party admits his wrong, as he necessarily must in making an application for remission of penalty (*The Princess of Orange,* 19 Fed. Cas. 1336, 1339, 1340, No. 11,431; *United States* v. *Morris,* 10 Wheat. 246, 295), I can see no reason nor justice in giving him this extra 'bite at the cherry' so that he may have two chances to clear himself instead of the one chance of the usual fair trial by his peers."

The discussion by counsel of the above cases on pages 29 to 32 of his brief seems hypercritical. The finding of the Court in the case at bar that guilt had been admitted, seems to find ample support in the evidence, even in the bond itself, and if this be true, the application for remission was regular and valid and a discussion of what might or might not be the

effect of action under a different state of facts than here presented, can not lend value to the present discussion. Is there any evidence to support this finding? is the sole question (and this assumes that the evidence may be looked into for this purpose).

FORM OF THE BOND.

We think the bond in suit when viewed in the light of surrounding circumstances and when itself examined from its "four corners", means nothing more nor less than an obligation to secure admitted penalties with a proviso that the amount of liability might be reduced if the penalties were remitted or mitigated. The discussion of this question by counsel for Government in the Court below seems to be in point.

"In the consideration of the question asked by the Court, we desire first to call the attention of the Court to the well settled rule that the contract must be construed, if possible, in order to have legal effect. This rule of construction is, indeed, but part of another well settled rule, that a contract will be construed according to the intention of the parties. It is not to be presumed that parties to a contract intend to enter into one which is wholly and utterly void. When the master of the Orteric and the sureties signed the bond in question, it is not to be presumed that they intended to engage in an idle, useless ceremony. To permit them to now contend that the agreement entered into was unlawful and void, should be done only where absolutely required.

"Some expressions of the Circuit Court of Appeals of the Eighth Circuit, employed by Sanborn, Circuit Judge, in the case of *United States Fidelity and Guaranty Co.* v. *Board of Commissioners,* reported in 145 Fed. p. 146, are apt. In that case a bond had been given, conditioned that 'if the body corporate, the Toronto Bank, Toronto, Kan., shall during the period from * * * well and faithfully perform the said trust reposed in it by such designation, * * * and shall well and truly indemnify the said board of county commissioners of Woodson county from any and all loss which it may suffer or sustain during the period aforesaid, by reason of the designation of the said Toronto Bank, Toronto, Kan., as such depository as aforesaid, then this obligation to be void, otherwise to remain in full force and virtue'. The contention was made that the undertaking was to indemnify the board, not against the defalcations of the private bank known as the Toronto Bank, but against the defalcations of the corporation, the Toronto Bank, Toronto, Kan., which was not designated to receive, and never did receive any of the deposits of the board. Said the Court:

> "The object of all construction of agreements is to ascertain the intention to the end that it may be enforced. The Court should, as far as possible, put itself in the place of the parties when their minds met upon the terms of the agreement, and then from a consideration of the writing itself, its purpose, and the circumstances which conditioned its making, endeavor to ascertain what they intended to agree to do—upon what

sense or meaning of the terms they used their minds actually met.

"The situation of these parties at the time this contract was made, the previous designation of the private bank as the depository of the funds of the county, the object of the execution and acceptance of the bond, the signature to it of the private bank as the principal, and a thoughtful study of all the terms and conditions of the contract itself, converge with persuasive force to forbid the conclusion that the Court below was in error when it found that the real intention of the parties expressed by this contract was that the obligors should bind themselves thereby to indemnify the plaintiff against the defalcations of the designated depository, regardless of the question whether that depository was a private or a corporate institution.

"Finally, the interpretation for which counsel for the defendant contend would render the bond ineffective and useless at the time it was executed by the obligors and accepted by the plaintiff and ever since. The board never designated the corporation, the Toronto Bank, Toronto, Kan., as a depository of its funds, and indemnity against losses resulting from such a designation was neither useful nor desired. That construction which sustains and vitalizes an agreement should be preferred to that which strikes down and paralyzes it. 'Such a construction should be placed upon the contract as will prevent its failure, and will give effect to the obligation of each of the parties appearing upon it at the moment the contract itself takes effect.' "

It will be noted in the case cited that evidence was permitted concerning the surrounding circumstances, even though the bond itself appears to have been in unambiguous terms.

Another case involving the principle just referred to is that of *Railroad Co.* v. *Kutter,* 147 Fed. 51, decided in the Circuit Court of Appeals for the Second Circuit. In that case parties to a contract set up its illegality. Says the Court:

> "The fundamental rule is that a contract will be construed, if possible, as being made for a legal rather than for an illegal purpose; its application certainly should not be relaxed when a vicious construction is sought for by the party who has made the contract."

In this case in construing the contract the Court took into consideration the actions of the party under it. Should the same rule be applied to the case at bar, the action of the owners of the Orteric in endeavoring to show that some of the occurrences on board the boat upon which their liability arose were caused under circumstances which would call for leniency, but which did not absolve the boat from all responsibility, would tend strongly to show that the determination of the Secretary of Commerce and Labor was a determination within his admitted powers to mitigate, and not within his determination as an arbitrator.

The case of *Hobbs* v. *McLean,* 117 U. S. 567, is instructive. It was there sought to have a contract of partnership, entered into with a view to carrying on work, a bid for which had already been made by one of the partners, declared void as being in conflict with a statute of the United States prohibiting assignment of claims against the United States, and it was like-

wise sought to have a subsequent agreement relative to this work declared void for the same reasons. Said the Supreme Court:

> "If the articles of partnership were fairly open to two constructions, the presumption is that they were made in subordination to and not in violation of section 3737; and if they can be construed consistently with the prohibitions of the section, they should be so construed. For it is a rule of interpretation that where a contract is fairly open to two constructions, by one of which it would be lawful, and the other unlawful, the former must be adopted."

A citation of the cases bearing on this point will be found in 17th Ency. of Law, 2d ed., pp. 17 and 18.

Akin to the proposition established by the foregoing authorities is one established by Chief Justice Marshall in the case of *Cooke* v. *Graham,* 3 Cranch 229, that the Court may depart from the letter of the condition of a bond to carry into effect the intention of the parties. Says the learned Chief Justice:

> "There are many cases on the construction of bonds, where the letter of the condition has been departed from to carry into effect the intention of the parties."

How far, in ascertaining the intention of the parties, may the Court go in receipt of parole evidence? An interesting and analytical discussion of this question is indulged in by Professor Wigmore (Wigmore on Evidence, Vol. 4, Secs. 2461-2465). In the note to Section 2465 will be found cited a number of decisions illustrating the cases in which parole evidence

may be admitted. A few particular citations on the rule are as follows:

> "The rule which excludes parole testimony to contradict or vary a written instrument has reference to the language used by the parties. It does not forbid an inquiry into the object of the parties in executing and receiving the instrument.
>
> *Brick* v. *Brick,* 98 U. S. 514.

> "Correspondence and other extrinsic evidence may be used to ascertain the true import of a letter of guaranty written by a party in the United States to a house in England.
>
> *Bell* v. *Bruen,* 1 How. 169.

> "An absolute assignment of a policy of insurance may be shown to be an assignment only as a security for money loaned.
>
> *Page* v. *Burnstine,* 102 U. S. 664.

> "Parole evidence may be given to show that a bond was made on condition that it should be void in a certain emergency."
>
> *Field* v. *Biddle,* 2 Dallas 171.

Of course the rule that in the construction of a contract the intention of the parties may be gathered from the subject matter and the circumstances, is well settled. Particular stress is laid upon the question of the subject matter of the contract in the following cases:

Richmond Mining Co. v. *Eureka Mining Co.,* 103 U. S. 839;
Chicago, R. I. & P. R. Co. v. *D. & R. G. R. Co.,* 143 U. S. 596;
Marion v. *United States,* 107 U. S. 437;
Scott v. *United States,* 12 Wall. 443.

This necessarily involves parole evidence.

In connection with this rule may be considered another well settled rule, namely, that the laws in existence at the time that a contract is made, including those which affect its validity and enforcement, enter into the contract and form a part of it.

> See *Insurance Co.* v. *Cushman,* 108 U. S. 51.
> *U. S. ex rel. Von Hoffman* v. *Quinsy,* 4 Wall. 535.

The construction given to a contract by the parties entering into it subsequent to its execution, is entitled to great weight.

> *Steinbock* v. *Stewart,* 11 Wall. 566;
> *Toplift* v. *Toplift,* 122 U. S. 121.

Assuming that it is proper to consider parole evidence of events preceding and succeeding the execution of the bond, it is not difficult at all to understand what the parties signing the bond actually did intend. Ship agents such as Davies & Company must have known the laws of the United States relative to the powers of the Secretary of Commerce and Labor. Realizing that certain powers relative to the infliction of penalties for the violation of the navigation laws were vested with the Secretary of Commerce and Labor, it is no violent presumption to say that they intended to submit to him questions which were within his jurisdiction, namely, questions concerning remission or mitigation. It will not do to say that the language of the bond shows an entirely different intent, for in truth and in fact it does not. While it

does in one part appear to pass up to the Secretary of Commerce and Labor the determination of whether or not a penalty had been actually incurred, yet, taking the whole instrument together, and reading into it the law of the land concerning the powers of the Secretary of Commerce and Labor, one must be forced to the conclusion that the intention of the makers of the bond was to secure the United States in the payment of penalties incurred, less the remission or mitigation determined by the Secretary of Commerce and Labor to be proper.

RULINGS OF EVIDENCE.

The foregoing of course disposes of the exceptions taken to the rulings on admission of evidence, for if the bond has not been varied, but simply interpreted in the light of the surrounding circumstances, of course the evidence was admissible and this was true as well of the letters and documents forwarded the Secretary of Commerce and Labor, as of any other evidence admitted.

OBJECTION THAT COMPLAINT DOES NOT STATE A CAUSE OF ACTION.

It is also unnecessary to consider this question further, for if the bond in suit may be considered a bond to pay admitted penalties, then the complaint states a cause of action and the judgment is amply supported by the complaint.

CONCLUSION.

In conclusion we submit that the plaintiffs in error, because getting clearance for their steamer without delay was considered a vital business with them, voluntarily and upon their own initiative gave the bond in question. That but for the giving of the bond, the boat would have been libeled and of course detained. That the acts and conduct of the master showed an admitted liability, his only hope being that the amount might be reduced. That no rule of law or public policy vitiates this bond. That the elements of common honesty and fair dealing require that this bond be declared valid and the liability of plaintiffs in error be declared.

The case has an important bearing upon the administration of the navigation laws, and bonds of this character facilitate the disposal of cases of this kind and are a distinct convenience to the boat owner as well as to the government. Believing that no rule or law contravenes, we therefore submit that judgment of the Court below should be affirmed.

Respectfully submitted,

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